

MAIL ROOM

Federal Communications Commission

FCC 00-352

2000 OCT 13 P 1:16

Before the  
Federal Communications Commission  
Washington, D.C. 20554

LIVED

In the Matter of	)	
	)	
Assessment and Collection	)	
of Regulatory Fees for	)	MD Docket No. <u>98-200</u>
Fiscal Year 1999	)	
	)	

**MEMORANDUM OPINION AND ORDER  
ON RECONSIDERATION**

Adopted: September 21, 2000; Released: October 10, 2000

By the Commission:

**I. INTRODUCTION**

1. The Commission revised its Schedule of Regulatory Fees for fiscal year (FY) 1999 in the *Report and Order* in this proceeding. *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, 14 FCC Rcd 9868 (1999) (*Report and Order*). Now before us is a petition for reconsideration of the *Report and Order*. We deny reconsideration for the reasons set forth below. In addition, on our own motion, we make a non-substantive amendment and correction to our rule on regulatory fee waivers to conform it to the text and intent of our order establishing the rule.

**II. BACKGROUND**

2. On June 11, 1999, we adopted the *Report and Order* in this proceeding, revising the Schedule of Regulatory Fees in order to collect \$172,523,000, the amount of regulatory fees that Congress has required us to collect for FY 1999. In the *Report and Order*, we determined the proportional amount of the \$172,523,00 to be collected from CMRS licensees is \$17,670,931. Also in the *Report and Order*, we estimated the FY 1999 CMRS category subscriber units to be 55,540,000. Thus, a CMRS fee of \$.32 per unit was established to recover \$17,670,931. *Report and Order*, 14 FCC Rcd at 9924.

3. On August 2, 1999, the Cellular Telecommunications Industry Association (CTIA) filed a petition for reconsideration in this proceeding. CTIA requested reconsideration of

our determination as to the estimate of FY 1999 CMRS subscriber units and as to the methodology utilized to calculate the regulatory fees for all services. We have received no other petitions for reconsideration, nor have we received any opposition to the CTIA petition.

### III. RECONSIDERATION ISSUES

#### A. FY 1999 CMRS Subscriber Unit Estimate

4. CTIA argues that our FY 1999 CMRS subscriber unit estimate is wrong and was not supported adequately. CTIA's position is that the correct number of subscriber units for the FY 1999 CMRS regulatory fee category is 69,200,000, the number of wireless industry subscriber units estimated by CTIA's annual voluntary survey of the industry. CTIA acknowledges that there have been discrepancies between the estimates of its surveys for prior years and the numbers subsequently reported by CMRS fee payors, but it believes that these discrepancies are attributable to errors in the Commission's collections system. CTIA thus believes that the Commission must use the CTIA estimate of 69,200,000 for calendar year 1998 wireless industry subscribers as the FY 1999 CMRS fee category subscriber unit estimate.

#### Discussion

5. We deny CTIA's petition as to our CMRS subscriber estimate. In the June 11, 1999 *Report and Order*, we estimated FY 1999 CMRS subscriber units to be 55,540,000. The FY 1999 CMRS fee category subscriber estimate provided for a growth factor of approximately 3.5% from FY 1998. More specifically, when the FY 1998 fees were paid, we determined that our FY 1998 CMRS subscriber unit estimate of 55,540,00 had exceeded by approximately 1.5% the actual subscriber units reported by CMRS licensees. For purposes of making the FY 1999 estimate, we therefore calculated the actual number of units that had existed in FY 1998 based on reported fee payments. The CMRS fee category for FY 1998 had also included small SMR CMRS systems (less than 10 MHz bandwidth), which we reclassified from the CMRS to the CMRS Messaging fee category for FY 1999. This further reduced the number of estimated CMRS units for FY 1999 by approximately 2% or 1 million subscriber units. As a consequence, the Commission's estimate of subscriber units for FY 1999 assumed that the number of CMRS fee units would increase by approximately 3.5% in FY 1999.

6. In the *Report and Order* in this proceeding, we specifically noted that we used a conservative growth factor to estimate CMRS subscriber units because our past estimates consistently exceeded the number of units actually reported by CMRS licensees. We had based our prior year estimates for CMRS fee units on publicly available estimates for wireless industry subscribers, including the CTIA survey estimates. That methodology, however, had consistently failed to predict accurately the number of CMRS units and thus consistently failed to recover the

amount allocated to the CMRS fee sector of the total amount that Congress mandated we recover from our regulatees. As we noted in the *Report and Order*, the overriding statutory purpose underlying the Commission's regulatory fee assessment is to recover the amount mandated by Congress.

7. Moreover, our experience has proven that the CTIA survey data is not as valid and reliable predictor of actual subscriber units as reported to the Commission.<sup>1</sup> It is true that the CTIA survey subscriber figures as of December 1996 and 1997 were close to the CMRS fee category subscriber figures reported to the Commission for FYs 1997 and 1998, respectively. Nevertheless, the CTIA estimates for those years still exceeded actual collection data. In some years the discrepancies have been substantial. For FY 1996, CTIA's figure was approximately 9 million units higher, and for FY 1995, approximately 2 million units higher than actual reported units. In addition, we now know the actual number of CMRS subscriber units reported to the Commission for FY 1999 was 65,743,286, approximately 3.5 million units less than figure CTIA had asked us to use. Had we followed CTIA's recommendation, the Commission would have substantially undercollected CMRS fee payments by \$4,522,274.00 in FY 1999.

8. CTIA also argues that it is unsupportable for the Commission to use CTIA's figures to describe the cellular telecommunications industry in one proceeding and to use another figure to assess CMRS regulatory fees, citing *Implementation of Section 6002(b) of the Omnibus 88 Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourth Report*, 14 FCC Rcd 10145 (1999) (*Fourth Report*). CTIA overstates our reliance on their figure in the *Fourth Report*. The Commission did not, as CTIA states, "conclude" or "officially recognize" that there were 69,200,000 CMRS subscribers. In describing the broad state of the industry, the Commission cited the CTIA survey figure of 69,200,000 cellular subscribers and other materials, including newspaper articles, periodicals, and "material prepared by researchers and consultants that study the industry." The Commission specifically noted that it did not verify the information in such materials and that "inclusion of these data in this report does not constitute a representation or warranty by the Commission of their accuracy or completeness." *Id.* at 10149, n.11. Similarly, CTIA states that "the Commission concluded that there were almost 61 million CMRS subscribers," as of June 1998, citing *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau (rel. Feb. 1999) (*Trends in Telephone Service*), p. [2]-1. Again, the Commission noted that it was using summary information on the industry provided by the CTIA survey. *Trends in Telephone Service* at 2-1, 2-2, 2-3. Further, CTIA states it provided the Commission with the calculations of Merrill Lynch and Donaldson, Lufkin & Jenrette, also concluding that there were roughly 69 million CMRS subscribers at year-end 1998. Again, the reports CTIA cites cited the

---

<sup>1</sup> CTIA survey responses are destroyed after use as part of a confidentiality arrangement. Thus CTIA's data cannot be compared to actual reporting by CMRS licensees, nor otherwise verified by the Commission.

CTIA survey for those figures. CTIA has shown that its survey is used, not that it is statistically accurate.

9. The Commission thus declines to assess regulatory fees based simply on CTIA estimates that do not bear a clear and verifiable relationship to units actually reported by CMRS licensees.<sup>2</sup> The current experience with CTIA's estimates is, as noted, that twice they have been close, and three times significantly higher, than reported units. We also note that CMRS licensees face civil and criminal penalties for false or inaccurate fee unit reporting to the Commission, and, as CTIA notes, we have no reason to believe there is significant underreporting by CMRS licensees. Therefore, rather than adopt CTIA's unverifiable figures, we reasonably may use the number of CMRS subscriber unit figures reported to the Commission for the prior fiscal year as a base to adjust in estimating the number of units for the next fiscal year.

10. In reaching this conclusion, we fully realize that, if the Commission underestimates the number of CMRS subscriber units for a fiscal year, an amount in excess of the costs allocated to the CMRS category will be collected from CMRS fee payors. For FY 1999, for example, we now know that the Commission did underestimate the number of CMRS subscriber units and thus overcollected \$3,265,052.00 for the CMRS fee category. The statutory fee scheme, however, requires us to make such predictions. It cannot ensure that the subscriber estimates are perfect, nor would it be reasonable to burden our regulatees and the taxpayers with the costs of a perfect scheme. For example, the inability to predict fee units perfectly has also resulted historically in undercollection of the amounts allocated to some fee categories, including the CMRS category in FYs 1995, 1996, 1997, and 1998. Those undercollections from CMRS licensees, which totaled \$3,126,088.00, were recovered by equally imperfect overcollections from other fee category payors and, in the last resort, by the American taxpayer. The possibility that the difficulties of estimating, which benefited CMRS licensees in past years, may instead this year benefit non-CMRS fee payors is not, however, a compelling reason to amend the Schedule of Regulatory Fees.

11. We do not believe that Congress contemplated a system whereby the Commission, after collection, issues refunds and requires corresponding increases in fees whenever our estimates result in over or undercollections of fees. Such a system would be administratively unworkable and prohibitively expensive to implement. A refund program

---

<sup>2</sup> CTIA argues the Commission cannot trust the reported CMRS subscriber figure because the Commission's Office of Inspector General (OIG) issued a report finding it could not sufficiently reconcile the collections database and the CMRS license database to provide for effective automated audit of CMRS licensee fee payment. The OIG report that CTIA cites, however, does not support CTIA's position. The OIG did not find the collections data unreliable as to actual fee payment or fee unit reporting. *Special Review Report Audit of Commercial Mobile Radio Service Regulatory Fees*, undated, Federal Communications Commission, Office of the Inspector General, available on the Internet at [http://www.fcc.gov/Bureaus/Inspector\\_General/Reports/rep98-8.txt](http://www.fcc.gov/Bureaus/Inspector_General/Reports/rep98-8.txt).

would require the Commission, after the fact, to make adjustments in all fee categories (i.e. for both those who overpaid and those who underpaid), because of the interdependent nature of fee categories in the fee setting process. This would, in turn, require a complicated accounting process to readjust all fee categories based on actual collections for each feeable service, and a cumbersome "double billing" process. In effect, the Commission would administer each year's fee program twice--once based on initial estimates, and a second time in the next fiscal year based on actual receipts in each category. Not only would that be prohibitively expensive to administer, given the number of transactions involved, but the process would generally only result in extremely small refunds to individual payors.

12. We will, of course, make every effort to minimize the possibility of overpayments and the subscriber figures from the fee collections in FY 1999 will be used as the starting point in calculating the FY 2000 CMRS regulatory fee. For FY 2000, the Commission has estimated CMRS subscriber units at 86,000,000, representing a growth factor of approximately 31% over actual subscriber units reported in FY 1999. (CTIA's estimate for the corresponding period was 86,047,003.) We encourage CTIA to share with us the best possible information regarding their subscriber estimates, so that we ensure we neither undercollect nor overcollect from CMRS licensees.

#### B. Cost Allocation Methodology

13. CTIA also argues that we failed to provide a reasoned explanation for the cost allocation methodology we used to calculate the FY 1999 Schedule of Regulatory Fees. In this regard, CTIA maintains that we failed to consider seriously the CTIA comment to the *Notice of Proposed Rule Making* in this proceeding, in which it argued that the Commission imposed a disproportionate share of fees "on the most rapidly growing sector of the telecommunications industry." Pet. for Reconsideration at pp. 2, 9. Specifically, CTIA contended in its comment that if the Commission merely adjusts the Schedule of Regulatory Fees to take into account increases and decreases in fee units, rather than entirely reapportioning the Commission's regulatory costs among the fee categories each year, the Commission impermissibly will ignore "the virtually certain reality that communications regulation experiences economies of scale." Comments, April 1, 1999, at p.3.

#### Discussion

14. We deny CTIA's petition as to allocation methodology. We considered, addressed, and rejected CTIA's comment in the *Report and Order* in this proceeding. Nothing in CTIA's petition for reconsideration persuades us that we failed to consider or address CTIA's comments or failed to act reasonably with respect to them. Briefly, we are required by Congress to make Mandatory Adjustments to our Schedule of Regulatory Fees annually. See 47 U.S.C. §

152(b)(2). These mandatory adjustments are to reflect increases or decreases in the number of licensees or other fee units and to establish fees that can reasonably be expected to result in collection of the amount mandated by Congress. We made such adjustments for FY 1999. We are also authorized by Congress to make Permitted Amendments to the Schedule of Regulatory Fees, if we determine that such amendment is necessary. *See* 47 U.S.C. § 152(b)(3). CTIA points to no specific evidence to support its assumption that industry growth has equated with reduced regulatory cost such that our present cost allocation is invalid. We have not seen convincing evidence of the economies of scale that CTIA postulates for FY 1999 or any other factor that makes it necessary for us to reapportion the Commission's regulatory costs and amend the Schedule of Regulatory Fees at this time.

C. Non-substantive Amendment and Correction to Regulatory Fee Waiver Rule

15. It has come to our attention that our rule on regulatory fee waivers does not conform to the text and intent of our order addressing requests for reductions of fees. On our own motion therefore, we amend and correct our rule on fee waivers. Specifically, in our order adopting rules on regulatory fee waivers, we concluded that the required fee must be submitted with any request for waiver or reduction of regulatory fees. *Implementation of Section 9 of the Communications Act*, 9 FCC Rcd 5333, 5344-45 (1994) (hereinafter *Order*). We excepted only the rare petitions requesting waiver or reduction based on financial hardship and which present compelling cases of financial hardship. We specifically rejected comments arguing that we should not generally require that fees be paid when requests for waiver or reduction of regulatory fees are filed. The language of the rule adopted in the *Order*, however, inadvertently included the phrase "less the amount of the requested reduction," following "the full fee payment," and did not include language regarding dismissing petitions not accompanied by full fee payment.<sup>3</sup> Our correction to the rule deletes the phrase "less the amount of the requested reduction" and adds the final sentence to conform the language of the rule to the text and intent of Paragraphs 33 to 35 of the *Order*. We therefore revise paragraph (d) of section 1.1166 of the Commission's Rules to read:

Petitions for reduction of a fee must be accompanied by the full fee payment and Form 159. Petitions for reduction accompanied by a fee payment must be addressed to the Federal Communications Commission, Attention: Petitions, Post Office Box 358835, Pittsburgh, Pennsylvania, 15251-5835. Petitions for reduction that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.

<sup>3</sup> The rule was originally designated as section 1.1165(a)(4) of the Commission's Rules.

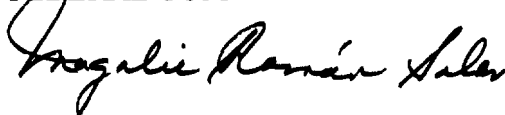
16. In the interests of fairness, we will ensure that no party that relied on the unamended language of section 1.1166(d) of the Commission's Rules will be prejudiced. The amended rule will apply only to petitions filed after the effective date of the amended rule.

#### IV. ORDERING CLAUSES

17. IT IS ORDERED that the Petition for Reconsideration filed on August 2, 1999 by CTIA IS DENIED.

18. IT IS FURTHER ORDERED that the rule amendment specified herein will become effective 30 days from the date of publication in the Federal Register. This action is taken pursuant to sections 4(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) & (j), 159, & 303(r).

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

## **RULE CHANGES**

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

### **PART 1 – PRACTICE AND PROCEDURE**

1. The authority citation for Part 1 continues to read as follows:

**Authority:** 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(4), 309.

2. Section 1.1166 is amended to revise paragraph (d) to read as follows:

#### **§ 1.1166 Waivers, reductions and deferrals of regulatory fees**

\*\*\*\*\*

(d) Petitions for reduction of a fee must be accompanied by the full fee payment and Form 159. Petitions for reduction accompanied by a fee payment must be addressed to the Federal Communications Commission, Attention: Petitions, Post Office Box 358835, Pittsburgh, Pennsylvania, 15251-5835. Petitions for reduction that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.